IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 515 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DY.CIT - Appellant(s)
Versus
MAHI VALLEY HOTELS & RESORTS - Opponent(s)

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Appearance :
MR KM PARIKH for Appellant(s) : 1,
None for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 31/08/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 The appellant-revenue has proposed the following two questions stated to arise out of order dated 11/03/2004 made by Income Tax Appellate Tribunal, Ahmedabad Bench 'B'.

> “[I] Whether the Hon'ble ITAT was right in law and on facts in holding that the assessment void ab-initio following the decision of the Tribunal in the case of Mrs.C.Malthy (supra) holding that when an assessment is framed u/s.143(3) of the Act by issuing statutory notice beyond the prescribed time limit, the said assessment is bad in law and has to be quashed, ignoring the fact that the assessee has not challenged the jurisdiction of the A.O. during the course of assessment proceedings on the ground that notice u/s. 143(2) was served beyond the time limit prescribed under the Act and ignoring the decision of the Madhya Pradesh High Court in the case of Dr.H.R.Rai (145 ITR 809)?”
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> (II)Whether the Hon'ble ITAT was right in law and on facts in holding the decision of the Tribunal in the case of Rakesh S.Maradia Vs. DCIT (2002) 74-ITJ (Ahd) 836, more particularly when the

decision of the ITAT in the said case is challenged by way of Tax Appeal No. 420 of 2000, which has been admitted vide order dated 20/12/2002 and is pending before Hon'ble High Court of Gujarat?”

2 Heard Mr.K.M.Parikh, learned Standing Counsel appearing for the appellant-revenue. It is submitted by him that the Tribunal has wrongly confirmed the order of CIT (Appeals) holding that as the notice under section 143(2) of the Income Tax Act,1961 was issued beyond the statutory time of one year from the end of the month in which the return was filed the assessment was void ab initio. It was urged by him that assessee had not challenged the issuance of notice under section 143(2) of the Act as being barred by limitation before the Assessing Officer and had raised the challenge before the Commissioner (Appeals) only for the first time. It was further submitted that the assessee having participated in the proceedings before the Assessing Officer there was acquiescence and waiver on part of the assessee which would result in the assessment being valid in law and the CIT (Appeals) and the Tribunal were wrong in reading the provisions as being mandatory so as

to treat the assessment void ab-initio.

3 The contention that the challenge was raised for the first time before the Commissioner (Appeals) and not before the Assessing Officer and hence could not have been entertained does not merit acceptance. The position in law is well settled that the Commissioner (Appeals) has the same powers that an Assessing Officer has and his powers are co-extensive with that of the Assessing Officer while determining correct income liable to tax in accordance with the provisions of the Act. Even otherwise, the issue raised is purely a legal issue based on provisions of the Act and the assessee can raise the same at any stage.

4 The second contention regarding there being acquiescence and/or waiver on part of the assessee by participating in the proceedings also does not merit acceptance. It is an admitted position that the return of income was filed on 30/03/1997 for Assessment Year 1997-98 and the notice under section 143(2) of the Act came to be issued for the first time only on 20/08/1998. Therefore, the notice was admittedly beyond the period of 12 months which is the statutory period of limitation

prescribed under the Proviso to sub-section (2) of Section 143 of the Act.

5 The Scheme of the Act broadly permits the assessment in three formats; (i) acceptance of the returned income; (ii) acceptance of returned income subject to permissible adjustments u/s.143(1) of the Act by issuance of intimation; and (iii) scrutiny assessment under section 143(3) of the Act. This Scheme was originally introduced by Direct Tax Laws (Amendment) Act,1989 with effect from 1.4.1989. The issuance of notice under section 143(2) of the Act is in the course of assessment in the third mode, namely, scrutiny assessment.

6 Section 143(2) of the Act requires that where return has been made by an assessee, if the Assessing Officer considers it necessary or expedient to ensure that the assessee has not understated the income, or has not computed excessive loss, or has not under-paid tax in any manner, he shall serve on the assessee a notice requiring him either to attend his office, or to produce, or cause to be produced there, any evidence on which the assessee may rely in support of the return. Therefore, the language of the main provision requires

Assessing Officer to prima facie arrive at satisfaction of existence of any one of the three conditions. Proviso under the said sub-section states :"provided that no notice under this sub-section shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished". On a plain reading of the language in which the proviso is couched it is apparent that the limitation prescribed therein is mandatory, the format of provision being in negative terms. The position in law is well settled that if the requirements of a statute which prescribes the manner in which something is to be done are expressed in negative language, that is to say, if the statute enacts that it shall be done in such a manner and in no other manner, such requirements are, in all cases absolute and neglect to attend to such requirement will invalidate the whole proceeding.

7 When the provision was first introduced in the statute the Central Board of Direct Taxes issued departmental Circular No. 549 dated 31/10/1989 and the necessity of the proviso as well as the consequences flowing on failure to issue notice within the limitation have been explained in the following words :

> “5.13 A proviso to sub-section (2) provides that a notice under the sub-section can be served on the assessee only during the financial year in which the return is furnished or within six months from the end of the month in which the return is furnished, whichever is later. This means that the Department must serve the said notice on the assessee within this period, if a case is picked up for scrutiny. It follows that if an assessee, after furnishing the return of income does not receive a notice under section 143(2) from the Department within the aforesaid period, he can take it that the return filed by him has become final and no scrutiny proceedings are to be started in respect of that return”.

(Ref:CBDT Circular No.549, dated 31st October,1989, Chaturvedi & Pithisaria's Income Tax Law, Fifth Edition, Vol.3, Pg.4737 at Pg.4742).

8 Originally the period of limitation was provided as “during the financial year in which the return is furnished” or within six months from the end of the month in which the return is furnished. By Finance (No.2) Act,1991 the proviso was substituted by the present

proviso extending the period of limitation to twelve months and vide departmental circular No.621 dated 19/12/1991, it was stated in paragraph No.49.1 of the circular that : “The aforesaid period of limitation for the service of a notice under sub-section (2) of Section 143 of the Act does not allow sufficient time to the Assessing Officers to select returns for scrutiny before assessment. Therefore, the provision was amended to provide that the notice can be served within twelve months from the end of the month in which the return is furnished”.(Ref:CBDT Circular No.621, dated 19th December,1991 Chaturvedi & Pithisaria's Income Tax Law, Fifth Edition, Vol.3, Pg.4747 at Pg.4748).

9 It goes without saying that the departmental authorities are bound by the circulars issued by the Central Board of Direct Taxes. In the circumstances, it is not open to the revenue to contend otherwise. These Circulars are explanatory. They give contemporaneous exposition of legal position. Even otherwise, on a plain reading of the section and the proviso it is more than abundantly clear that the proviso prescribes a mandatory period of limitation in light of the scheme of assessment wherein majority of returns are required to

be accepted without scrutiny and only certain returns are taken up for scrutiny.

10 The orders of the Commissioner (Appeals) and the Tribunal reflect correct reading of the statutory scheme of the Act which is plain, unambiguous and clear, as well as in consonance with the circulars of the Board. In these circumstances, no substantial question of law arises from the impugned order of the Tribunal. The appeal is accordingly dismissed.

11 Before parting it is necessary to note that the earlier decision of the Tribunal in case of Rakesh S. Mardia (Tax Appeal Nos. 420, 421 & 422 of 2000) is entirely in different context, i.e in light of block assessment which provides for a different scheme of assessment.

(D.A.Mehta, J) (H.N.Devani,J)

m.m.bhatt